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BLEED THROUGH

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 398

CAPITAL SERVICE, INC., DOING BUSINESS AS DANISH MAID BAKERY, AND G. BRASHEARS, INDIVIDUALLY AND AS PRESIDENT OF SAID CORPORATION, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below, as amended on rehearing (R. 166-175), is reported at 204 F. 2d 848. The findings of fact and conclusions of law of the trial court (R. 56-60), the United States District Court for the Southern District of California, are not officially reported.

JURISDICTION

The judgment of the court below, as amended on rehearing, was entered on May 12, 1953 (R. 176). On August 3, 1953, Mr. Justice Clark extended the time for filing a petition for a writ of certiorari through October 9, 1953 (R. 178). The petition was filed on October 9, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a state court has jurisdiction to enjoin, on the ground that it violates state labor relations policy, union activity which is affirmatively regulated by the National Labor Relations Act, such activity either all constituting unfair labor practices under Section 8(b) of the Act, or in part such practices and in part conduct protected by Section 7.

2. Whether the Board had power to institute this suit in a federal district court for purposes of protecting the rights and remedies established under the Act against encroachment by the state court.

3. Whether equitable relief, nullifying the continued effectiveness of the invalid state court action, was properly granted in this suit.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (49 Stat. 449, 61 Stat. 136, 29 U. S. C. (Supp. V) 151, *et seq.*, are set forth in the Appendix, *infra*, pp. 23-27.

STATEMENT

A. The Facts Underlying the Instant Suit

Petitioner Capital is engaged in the manufacture and distribution of bakery products in and around Los Angeles, California (R. 57).[1] Early in February 1952, following prior unsuccessful attempts to organize Capital's employees, representatives of Bakery Drivers Local Union No. 276 (herein referred to as the Union) sought to enlist the aid of the purchasers and consumers of Capital's products in a new organizing effort. Union agents contacted the management of various retail stores handling these products and advised that the Union had a dispute with Capital because it was "non-union" and on the unfair list of the Los Angeles Central Labor Council. The store was requested to cease handling Capital's products, and told that, unless it did so, a picket line would be set up. (R. 86, 138-139, 142, 144-145.)

Several of the stores acceded to the Union's

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[1] During 1951, the year preceding the events in this case, Capital purchased raw materials valued in excess of $500,000, approximately $30,000 of which was received directly from points outside of California, and approximately $175,000 of which was received indirectly from outside that state. Moreover, four of the retail grocery markets which sell its products, and whose businesses were affected by the events in this case, annually receive shipments of goods originating out of California in amounts ranging from $250,000 to $1,000,000. (R. 57; 90, 91, 2-3.) On these facts, the union activities hereafter described have, as petitioners apparently concede (Pet. 8), a sufficient impact on commerce to warrant the exercise of Board jurisdiction thereover. *Capital Service, Inc.*, 100 NLRB 1092, motion to modify denied, 106 NLRB No. 27 (July 17, 1953); see *Jamestown Builders Exchange, Inc.*, 93 NLRB 386.

initial request and discontinued orders of Capital's products (R. 111, 113, 115, 145). At the other stores, the Union established peaceful picket lines, the pickets carrying placards which read (R. 58; 99-100):

TO THE PUBLIC
DANISH MAID
BAKERY PRODUCTS
SOLD HERE ARE MADE
AND DELIVERED BY
A BAKERY THAT IS
NON-UNION
AND ON THE
WE DO NOT PATRONIZE LIST
OF THE
LOS ANGELES CENTRAL LABOR COUNCIL
LOS ANGELES FOOD COUNCIL
JOINT COUNCIL OF TEAMSTERS' UNION 42
BAKERY DRIVERS' LOCAL 276
BAKERS' LOCAL NUMBER 37

Some of the picketing was carried on in front of the consumer entrances to the stores, and some occurred at the entrances where the store received deliveries from suppliers (R. 97, 129-130, 132, 148-149). Deliverymen bringing supplies to the stores, who themselves were Union members, refused to make their regularly scheduled deliveries upon seeing the pickets (R. 130, 136, 143-144). Moreover, at times the pickets approached the deliverymen and urged them not to cross the picket lines, whereupon the supply trucks would drive off (R. 110, 130,

133). When a store being picketed removed Capital's products from its shelves, the pickets were withdrawn, and deliveries by suppliers were resumed (R. 115, 127-128, 135, 145-146).

Petitioners countered by seeking relief before both state and federal tribunals. Thus, on Friday, February 18, 1953, they filed suit for an injunction in the Superior Court of California, on the ground that the aforementioned Union activity constituted a conspiracy in restraint of trade prohibited by the California anti-trust law, the Cartwright Act (R. 18-37).[2] Three days later—Monday, February 21—they filed an unfair labor practice charge with the National Labor Relations Board's Regional Office, asserting that the same conduct alleged in the state court complaint, engaged in by the same labor organizations specified therein, constituted unfair labor practices within the meaning of Section 8(b)(4)(A) of the National Labor Relations Act (R. 11-16).[3]

On April 3, 1952, the Superior Court issued a preliminary injunction banning *all* picketing and allied union activities at the retail stores (R. 40-42.) In an opinion accompanying this injunction,

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[2] Made defendants to this action were the Union, the other labor organizations listed on the placards carried by the pickets, and certain of the retail stores affected by the picketing; the stores, however, were never served with process (R. 118).

[3] The same day, petitioners also filed a damage suit in the federal district court against these labor organizations, on the theory that this conduct was independently unlawful under Section 303 of the Labor Management Relations Act, 61 Stat. 136, 158-159, 29 U.S.C. (Supp. V) 187 (R. 4).

the Superior Court expressly rejected petitioners' contention that such activities violated the Cartwright anti-trust law, and pointed out that the case merely involved an attempt "to unionize" Capital's employees (R. 42). The court, conceding that it was "pioneering," predicated the injunction on its power "to declare the public policy of [California]," and—after evaluating the respective rights of the three interests "affected by a labor dispute, (1) management, (2) labor and (3) the public"—on its conclusion that "secondary picketing" was contrary to state policy (R. 44). A motion by the unions so enjoined to vacate the injunction, on the ground that the Board had exclusive jurisdiction to regulate the conduct involved and indeed had the same case pending before it, was summarily denied (R. 46-47).

Meanwhile, the Board's Regional Director, upon investigation of petitioners' unfair labor practice charge covering the identical conduct, concluded that there was reasonable cause to believe that only one of the labor organizations specified in the charge, the Union, had engaged in conduct violative of the Act, and then only insofar as its conduct could be deemed to have induced or encouraged employees of employers other than Capital to engage in concerted refusals to perform services for the purpose of forcing or requiring Capital's customers to cease doing business with it. Insofar as the conduct merely involved an appeal to the public in general, the Regional Director concluded that it was valid and proper under the Act. Accordingly, the

Regional Director issued an unfair labor practice complaint on this limited basis, alleging that the Union's inducement of secondary employees constituted, *inter alia,* an unfair labor practice under Section 8(b)(4)(A), and, as required by Section 10(l) of the Act, he also petitioned the appropriate federal district court for an injunction restraining such conduct pending final Board adjudication (R. 37-40, 66-70).

At the same time, the Board concluded that the outstanding Superior Court injunction regulating the same conduct, not only invaded the field preempted by the Act, but rendered virtually meaningless the judgment which would ultimately be issued by the federal court and the Board in the unfair labor practice proceeding.[4] Hence, simultaneously with the filing of the Section 10(l) petition against the Union, the Board instituted, in the same federal district court, the instant suit against petitioners for the purpose of removing the impediment created by their Superior Court injunction (R. 1-10).

B. The Conclusions and Order of the District Court

The complaint in the instant suit, predicated on 28 U. S. C. 1337,[5] alleged that the National Labor Relations Act had preempted regulation of the activities covered by the outstanding Superior Court

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[4] Cf. *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U.S. 767, 775-776.

[5] This section provides that:

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

injunction, and had thereby removed them from the ambit of state regulation. More specifically, the complaint alleged that the Union's picketing at the delivery entrances of the retail stores and its oral requests to deliverymen not to make deliveries (hereafter called "delivery entrance picketing") constituted inducement of secondary employees to engage in concerted refusals to perform services, proscribed by Section 8(b)(4)(A) of the Act, and was the subject of a concurrent Section 10(l) proceeding in the District Court (R. 7). It was further averred that the remainder of the Union activity—appeals to ultimate consumers through picketing at the consumer entrances of the stores (hereafter called "consumer entrance picketing")—constituted conduct affirmatively protected under Section 7 of the Act (R. 8). Finally, it was alleged that the continued effectiveness of the invalid Superior Court injunction irreparably impaired the Congressional objective of a uniform national labor policy in industries affecting commerce, and nullified, *pro tanto,* Board and district court action in the cases before them involving the same subject matter (R. 9).

After hearing, the District Court entered findings of fact and conclusions of law sustaining the allegations of the complaint (R. 56-60). The court found that all of the aforementioned Union activities were in furtherance of a labor dispute with Capital, that they affected commerce within the meaning of the Act, and that the Superior Court injunction regulated the same conduct which the

Board had to evaluate in the case before it. The court further found that the delivery entrance picketing appeared to constitute a violation of Section 8(b)(4)(A) of the Act,[6] and that the consumer entrance picketing, though not an unfair labor practice, was nevertheless in the field covered by the Act and thus preempted thereby. (R. 59-60.) Accordingly, the court concluded that the Superior Court was without jurisdiction to restrain any of these concerted activities, and its action in doing so constituted an encroachment upon the exclusive regulatory scheme established by the Act (R. 60).

In addition, the District Court concluded that the Board was vested with authority to institute the instant suit for the purpose of vindicating the policies of Congress and protecting its own jurisdiction; that it had been established that a preliminary

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[6] The District Court made the same finding in the Section 10(l) proceeding, which, because it turned on the same facts as those underlying the instant suit, had been consolidated with the latter for purposes of hearing (R. 89). In the Section 10(l) proceeding, the court then entered—at the same time that it entered the decree herein against petitioners (p. 10, *infra*)—an injunction enjoining the Union, pending final Board adjudication, from engaging in those of its activities, *i.e.*, the delivery entrance picketing, which appeared to constitute a violation of Section 8(b)(4)(A) of the Act (R. 76-77).

Subsequently, the Board has issued a Decision and Order finding that the delivery entrance picketing did in fact violate Section 8(b)(4)(A), and has entered an appropriate cease and desist order. *Capital Service, Inc.*, 100 NLRB 1092, motion to modify denied, 106 NLRB, No. 27 (July 17, 1953). Petitioners, pursuant to Section 10(f) of the Act, are now seeking review of this order in the Court of Appeals for the Ninth Circuit, assigning as error the Board's failure to find that the Union's consumer entrance picketing was also an unfair labor practice under the Act. *Capital Service, Inc.* v. *National Labor Relations Board*, No. 13,864 (C.A. 9).

injunction was necessary and proper to avoid further irreparable impairment of the policies of the Act, to protect the exclusive jurisdiction of the Board over the identical case before it, and to effectuate the interim Section 10(l) decree entered therein by the District Court; and that Section 2283 of the Judicial Code (see n. 18, p. 20, *infra*) did not bar issuance of such injunction, where, as here, an exclusive federal jurisdiction required vindication (R. 60).

The District Court entered a preliminary injunction enjoining petitioners from "enforcing or seeking to enforce . . ." or otherwise enjoying the benefits of the decree issued by the Superior Court. They were also enjoined "from taking or applying for any further proceedings in said Superior Court the effect of which would be to enjoin or restrain" the Union and the other labor organizations who were made defendants in the Superior Court suit "from engaging in peaceful picketing or other concerted activities affecting the customers of Capital . . . and their suppliers, and which are carried on pursuant to a labor dispute with Capital. . . ." (R. 61.)

C. The Conclusions of the Court Below

On appeal, the court below affirmed the order of the District Court. The court below agreed that regulation of all of the conduct covered by the Superior Court injunction was preempted by the Act, and that the Board was entitled to prevent it from continuing to infringe upon the exclusive

procedures established by the Act. The court, however, differed in part with the District Court over the manner in which the Act had affirmatively regulated the Union activity in question. It agreed that the delivery entrance picketing constituted an unfair labor practice under Section 8(b)(4)(A), but concluded that the consumer entrance picketing, rather than being conduct protected by Section 7 of the Act, also constituted an unfair labor practice, violating Section 8(b)(1)(A).[7] (R. 166-175.)

ARGUMENT

The question whether a state court has jurisdiction to enjoin conduct affirmatively regulated by the Act, is already before this Court in *Garner* v. *Teamsters,* No. 56, this Term, argued October 20-21, 1953. Accordingly, insofar as this question is concerned, we respectfully request that the Court retain the instant petition on its docket pending decision in *Garner,* and then dispose of it in accordance therewith. Since the Board's *amicus* brief in *Garner* fully explains its position on that issue, we shall not repeat the position in detail. However, in view of petitioners' attempt to enlarge the scope of the case, certain additional comments appear warranted, and they are set forth in Point 1 below. The

[7] The theory of the court below in this respect was that, although the consumer entrance activity did not induce or encourage secondary employees as did the delivery entrance picketing, it did exert pressure not to buy Capital's products, which in turn threatened the continued employment of Capital's own employees. As a result, it was reasonable to expect that these employees could no longer freely exercise the right guaranteed by Section 7 to refrain from union membership. (R. 171-172.)

remaining procedural questions presented, *viz.*, whether the Board had power to institute a suit of this character in a federal district court for the purposes of protecting the rights and remedies established under the Act against encroachment by a state court, and whether equitable relief was properly granted in this suit, raise no issues, apart from the first question, warranting review by this Court.

1. Viewing the entire picketing here as constituting unfair labor practices under the Act—the delivery entrance activity coming within the ban of Section 8(b)(4)(A), and the consumer entrance picketing within Section 8(b)(1)(A)—, the court below properly concluded that "control by the federal tribunals is exclusive" (R. 174-175), and thus the state court lacked jurisdiction to regulate any of the conduct. *Plankinton Packing Co.* v. *Wisconsin Employment Relations Board,* 338 U.S. 953; *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U.S. 767, 775-776; Board Brief in *Garner,* No. 56, this Term. In agreement with the court below, petitioners concede (Pet. 8) that all of the union activity "violates" the Act, but contest the ensuing conclusion that this circumstance precludes a state court from providing additional sanctions. Consequently, the question raised by the petition, as petitioners recognize (Pet. 10, Br. 23), is the same question involved in the *Garner* case, *i.e.,* whether a state court can enjoin conduct amounting to unfair labor practices under the Act. To this question, petitioners ad-

dress but one argument—*viz.*, that Section 10(a) of the Act was only intended to preclude concurrent regulation by state administrative agencies and not by state courts (Br. 23-26)—a contention which, for reasons outlined in the Board's brief in *Garner*, pp. 30-41, is insubstantial.

Although the Board, in the court below, viewed the conduct differently—partly as an unfair labor practice under the Act and partly as conduct protected by Section 7 thereof—this view does not alter the propriety of the court's ultimate conclusion that the state court lacked jurisdiction over all of the conduct. For, no more than the states may impose additional sanctions for unfair labor practices proscribed by the Act, "states may not regulate in respect to rights guaranteed by Congress in Section 7" of the Act. *Amalgamated Association* v. *Wisconsin Employment Relations Board*, 340 U.S. 383, 391; see *Hill* v. *Florida*, 325 U.S. 538.

However, petitioners, in their supporting brief (Br. 17-23), shift from the assumption that all of the conduct involved is affirmatively regulated by the Act—which assumption underlies, not only the positions of the Board and the court below, but also that of the petition itself—and argue the wholly separate question of whether the Act precludes state regulation of conduct neither protected nor prohibited thereby. Apart from the fact that this question does not appear to have been properly raised (*General Pictures Co.* v. *Electric Co.*, 304 U.S. 175, 179) and that petitioners' reasons

for asserting that the instant activity is outside the Act are insubstantial,[8] the question which petitioners thus seek to interject is, nevertheless, not presented on the facts of this case.

It is apparent that the delivery entrance activity was calculated to, and did, induce and encourage deliverymen not to supply the retail stores, and, indeed, on several occasions the pickets orally requested deliverymen not to unload their supplies (p. 4, *supra*). Accordingly, this activity, as the court below, the District Court and the Board have found (pp. 11, 9, 7, *supra*), falls precisely within the proscription of Section 8(b)(4)(A) of the Act. *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 341 U.S. 694.

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[8] Petitioners' conclusion that the instant activity is outside the Act rests on this reasoning: such activity was in furtherance, not of a labor dispute, but of a restraint of trade violative of the California anti-trust laws; the Act only covers conduct growing out of a labor dispute, and hence it cannot apply here. But, the assumption that there was no labor dispute is flatly repudiated by the findings, not only of the two federal courts below (R. 59, 169-175), but also of the state court which issued the injunction underlying the instant suit. The state court specifically rejected petitioners' contention that the picketing constituted a restraint of trade under state law, and then, concluding that it was merely an attempt "to unionize" petitioners' employees, proceeded to find the activity unlawful as a matter of state labor relations policy (pp. 5-6, *supra*, R. 43-45). Moreover, irrespective of how the instant picketing would be classified under state law, the question of whether it falls within the Act depends upon whether it meets the terms thereof, a condition which both the District Court and the Court of Appeals found was satisfied.

It is also significant that petitioners, in the proceedings to review the Board's unfair labor practice order now pending in the Ninth Circuit (n. 6, p. 9, *supra*), are contending that the consumer entrance picketing here violated Section 8(b)(1)(A) of the Act, and do not challenge the Board's finding that the delivery entrance activity violated Section 8(b)(4)(A).

The consumer entrance picketing, on the other hand, did not amount to inducement or encouragement of secondary employees in the course of their employment, but constituted an appeal to the public to refrain from buying Capital's non-union products. History reveals that a peaceful appeal of this kind was one of the conventional tactics of organized labor which Congress undertook to protect when, in Section 7 of the Wagner Act, it accorded to employees the right to engage in "concerted activities, for the purpose of collective bargaining or other mutual aid or protection."[9] Although the Act was amended in 1947, the terms of Section 7 of the Wagner Act, insofar as here relevant, were continued unchanged, and the original scope of this provision was qualified only to the extent that the newly added Section 8(b) classified certain concerted activities previously protected as unfair labor practices.[10] Accordingly, under the amended Act, the consumer appeal herein is still protected by Section 7, unless it has been encompassed within the proscriptions of Section 8(b);[11] in no event,

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[9] See Daugherty, *Labor Problems in American Industry* (Houghton, Mifflin, 1941) p. 487; Stein, *et al.*, *Labor Problems in America* (Farrar & Rinehart, 1940), pp. 610-611; Frankfurter and Greene, *The Labor Injunction* (Macmillan, 1930), pp. 219-220; 79 Cong. Rec. 7670; *National Labor Relations Board* v. *Peter Cailler Kohler Swiss Choc. Co.*, 130 F. 2d 503, 505-506 (C.A. 2).

[10] See 1 Legislative History of the Labor Management Relations Act, 1947 (Gov't. Print. Off., 1948), 49, 77-79, 542-544, 562-563.

[11] The court below, on reviewing the legislative history of Section 8(b)(1)(A), concluded that this provision was intended to reach the activity in question (R. 169-173). On the other hand, the Board, reading such history differently, had argued in the court below that Congress left the activity within

however, would it fall in the category of conduct neither prohibited nor protected by the Act.

In sum, this case merely involves the question of whether a state court has power to regulate conduct affirmatively regulated by the Act, and there is no need to determine whether the Act would preclude state control over activity which it neither protects nor prohibits.[12] Hence, should this Court decide in *Garner* that the Act closed the door to concurrent state court regulation, this would be

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the protection of Section 7. See *Perry Norvell Co.*, 80 NLRB 225, 238-243; *Watson's Specialty Store*, 80 NLRB 533, 539-546-548, enforced, 181 F. 2d 126 (C.A. 6), affirmed, 341 U.S. 707; *Crowley's Milk Company, Inc.*, 102 NLRB No. 102 (February 4, 1953), enforced, 33 LRRM 2110, 2112-2113 (C.A. 3, November 13, 1953); *Consolidated Frame Co.*, 91 NLRB 1295, 1299; *The Higbee Co.*, 97 NLRB 654, 666-668; 93 Cong. Rec. 4867 (Senator Taft). A resolution of this difference is unnecessary here, for, under either alternative, the ultimate conclusion of the court below is valid (p. 13, *supra*).

[12] This was the situation thought to exist in the *Auto. Workers*, *Goodwins* and *Sommer* cases cited by petitioners (Br. 17-19). Thus, in *Auto. Workers* v. *Wisconsin Employment Relations Board*, 336 U.S. 245, which involved the novel technique of "quickie strikes," this Court emphasized that such tactic was "neither forbidden by federal statute nor was it legalized and approved thereby" (at 265). Unlike the situation here, there could consequently be "no existing or possible conflict or overlapping between the authority of the Federal and State Boards, because the Federal Board has no authority either to investigate, approve or forbid the union conduct in question" (at 254). Similarly, in *Goodwins* v. *Hagedorn*, 303 N.Y. 309, 101 N.E. 2d 697 (N. Y. Ct. Appeals) and *Sommer* v. *Metal Trades Council*, 40 A.C. 396, 254 P. 2d 559 (Cal. S. Ct.) —which involved picketing for recognition by minority unions at a time when the employer had already recognized another union or when the representation question was pending before the Board—both courts arrived at their conclusion that the state had power to ban the activity only after having first found that it was neither within the ban of Section 8(b)(4)(C) of the Act nor protected by Section 7 thereof (101 N.E. 2d at 699-700; 254 P. 2d at 564-565).

dispositive of the substantive issue in the instant case.

2. The contention (Br. 13-14) that the Board lacked authority to initiate the instant suit is without merit. It is immaterial that such power is not specifically conferred by any provision of the Act, for, where effectuation of the policies of a statute so requires, the power of administrative agencies to initiate or participate in judicial proceedings has frequently been implied.[13] Similarly here, it is manifest that Congress, in creating the Board as "'a single paramount administrative or quasi-judicial authority in connection with the development of the Federal American law regarding collective bargaining'" (*Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 267), contemplated that it would be empowered to take whatever legal steps appeared necessary to insure that the rights and remedies created by the Act remained exclusive. Otherwise, achievement of the uniform national labor policy envisioned by Congress would be left to the accident of whether, and how successfully, litigants in private suits defended the Act's exclusive jurisdiction against infringement. Accordingly, the other courts which have had occasion to consider the matter have uni-

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[13] See *Bowles* v. *Willingham*, 321 U.S. 503, 510-511, 522-523; *Securities and Exchange Commission* v. *United States Realty and Improvement Co.*, 310 U.S. 434, 460; *Walling* v. *Brooklyn Braid Co.*, 152 F. 2d 938, 940 (C.A. 2). See also, *National Labor Relations Board* v. *Sunshine Mining Co.*, 125 F. 2d 757 (C.A. 9); *National Labor Relations Board* v. *Killoren*, 122 F. 2d 609 (C.A. 8), certiorari denied, 314 U.S. 696.

formly agreed with the conclusion of the courts herein that the Board has power to invoke judicial processes for purposes of vindicating the paramount policies of the Act.[14]

Petitioners wholly misconceived the nature of this case in suggesting (Br. 14) that the Board's cause of action should have been litigated in an unfair labor practice proceeding under the Act. Apart from the fact that it is not clear to what extent, if any, action by an employer in securing an invalid state injunction constitutes an unfair labor practice under the Act,[15] the complaint here sought, not a remedy for unfair labor practices, but one that could displace state action which had encroached upon the field preempted by the Act, and had, indeed, interfered with the operation of its unfair labor practice procedures. Plainly, the Act's unfair labor practice procedures were not designed, nor are they adequate, for this purpose.

3. Likewise without substance is the contention (Br. 27-30) that there was no claim warranting federal equitable intervention in the state court proceeding. As we have shown (pp. 12-16, *supra*), the Act—in furtherance of the judgment of Congress that industrial strife would be minimized by a uniform national labor policy in industries affecting commerce—preempted control over all of the activity regulated by the Superior Court injunction and thus deprived that court of jurisdic-

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[14] *National Labor Relations Board* v. *New York State Labor Relations Board*, 106 F. Supp. 749 (S.D. N.Y.); *National Labor Relations Board* v. *Industrial Commission of Utah*, 84 F. Supp. 593 (D. Utah), affirmed, 172 F. 2d 389 (C.A. 10).

[15] See *W. T. Carter and Brother*, 90 NLRB 2020, 2023-2024, 2029.

tion over such activity. In these circumstances, state court intrusion upon the exclusive federal field nullifies the will of Congress (Cf. *Bowles* v. *Willingham*, 321 U. S. 503, 511, 523), and creates the uncertainties and potential conflicts which are so disruptive of industrial peace that "a case by case test of federal supremacy is [not] permissible here." *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767, 776.[16] Thus, as the District Court found (pp. 9-10, *supra*) and the court below tacitly affirmed, petitioners' state court decree—explicitly predicated on the same labor relations considerations which Congress had evaluated in the Act—presented a clear and imminent threat of irreparable injury to the regulatory scheme of the Act. And, since the Board was not a party to the state court proceeding (Cf. *Hale* v. *Bimco Trading Co.*, 306 U. S. 375, 377-378), and that court had already refused to acknowledge its lack of jurisdiction over the subject matter (p. 6, *supra*), only the processes of the federal courts afforded adequate assurance of a speedy vindication of the national policy. Cf. *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 228.

For these reasons, it has consistently been held that a case for federal equitable relief is established where, as here, state action has, or threatens to, invade the field preempted by the Act.[17] This con-

[16] See also, *Lacrosse Telephone Corp.* v. *Wisconsin Employment Relations Board*, 336 U.S. 18, 25-26; cf. *A.F.L.* v. *Watson*, 327 U.S. 582, 594-595.

[17] *National Labor Relations Board* v. *Industrial Commission of Utah*, 84 F. Supp. 593 (D. Utah), affirmed, 172 F. 2d 389 (C.A. 10); *United Office and Professional Workers* v. *Smiley*, 77 F. Supp. 659 (M.D. Pa.); *Linde Air Products Co.* v. *Johnson*,

clusion remains valid even where, as is also true here, it is the action of a state court, rather than some other state authority, which has caused the interference. Thus, while 28 U.S.C. (Supp. V) 2283 [18] provides a rule of comity for state and federal tribunals having a concurrent jurisdiction, it does not, as the District Court held (p. 10, *supra*), militate against a stay when the state court, acting without authority, has undertaken to encroach upon an exclusive federal jurisdiction.[19]

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77 F. Supp. 656 (D. Minn.); *Food, Tobacco, et al. Workers* v. *Smiley*, 74 F. Supp. 823 (E.D. Pa.), affirmed, 164 F. 2d 922 (C.A. 3). Compare, *Merced Dredging Co.* v. *Merced County*, 67 F. Supp. 598, 613 (S.D. Cal.); *Board of Trade* v. *Illinois Commerce Comm'n.*, 156 F. 2d 33 (C.A. 7), affirmed, 331 U.S. 218; *All American Airways, Inc.* v. *Village of Cedarhurst*, 106 F. Supp. 521 (E.D. N.Y.), affirmed, 201 F. 2d 273 (C.A. 2).

The situation here is thus distinguishable from *Ackerman* v. *I.L.W.U.*, 187 F. 2d 860 (C.A. 9) and *Alesna* v. *Rice*, 172 F. 2d 176 (C.A. 9) (Br. 28), involving state criminal proceedings. In those cases, the state courts had jurisdiction over the subject matter, and, since the individuals claiming that the state proceeding abridged federal rights were parties to the proceeding, the state court system afforded an adequate mechanism for adjudicating the issue. Cf. *Stefanelli* v. *Minard*, 342 U.S. 117, 120.

[18] This provision, which was formerly Section 265 of the Judicial Code, now reads: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

[19] *National Labor Relations Board* v. *New York State Labor Relations Board*, 106 F. Supp. 749, 752 (S.D. N.Y., Bondy, J.); *Brown* v. *Wright*, 137 F. 2d 484, 488 (C.A. 4); *Bowles* v. *Willingham*, 321 U.S. 503, 510-511 (alternative ground); *Porter* v. *Dicken*, 328 U.S. 252, 255; *Fleming* v. *Rhodes*, 331 U.S. 100, 107-108; *Western Fruit Growers* v. *United States*, 124 F. 2d 381, 386-387 (C.A. 9). Cf. *Hale* v. *Bimco Trading Co.*, 306 U.S. 375; *Wells Fargo & Co.* v. *Taylor*, 254 U.S. 175, 182-184.

The cases of *Davega-City Radio* v. *Boland*, 23 F. Supp. 969 (S.D. N.Y.) and *United Electrical et al.* v. *Westinghouse Electric Corporation*, 65 F. Supp. 420 (E.D. Pa.), cited by

Finally, contrary to petitioners' assertion (Br. 29), *Montgomery Building and Construction Trades Council* v. *Ledbetter Erection Company*, 344 U. S. 178, in no way detracts from the propriety of the injunctive relief granted in this case. The dismissal of certiorari in that case was predicated solely upon the ground that the state court preliminary injunction sought to be reviewed was not a final order within the requirements of the statutory provision which gives this Court jurisdiction to review state court orders. See 28 U. S. C. 1257. Manifestly, that decision has no bearing whatever on the different question of whether a federal district court, in the exercise of its original jurisdiction, may properly bar the continued effectiveness of a state court preliminary injunction.

CONCLUSION

For the foregoing reasons, we respectfuly suggest that, insofar as the first question herein is concerned, this Court should retain the present petition on its docket pending decision in *Garner* v. *Teamsters*, No. 56, this Term, and then dispose of said question in accordance with the holding in that case. Apart from the first question, the sec-

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petitioners (Br. 28), are inapposite. *Davega-City*, as explained by the court in *National Labor Relations Board* v. *New York State Labor Relations Board*, 106 F. Supp. at 753, "was decided [in 1938] when the jurisdiction of the State Board over enterprises affecting commerce was considered concurrent with that of the National Board in the absence of prior action by the National Board in the particular case." Similarly, *Westinghouse Electric* is explained by the fact that it involved conduct (mass picketing and violence) over which, unlike here, the state court possessed a concurrent jurisdiction.

ond and third questions herein present no issues warranting review, and the petition should be denied as to them.

Respectfully submitted.

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DECEMBER, 1953.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (49 Stat. 449, 61 Stat. 136, 29 U.S.C. Supp. V, 151 *et seq.*), are as follows:

DEFINITIONS

Sec. 2. When used in this Act—

* * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the

purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8. * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

* * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer,

or to cease doing business with any other person; * * * (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

* * * * *

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 8(b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further,* That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon filing of any such petition the courts shall cause notice

thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further,* That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D).

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